IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 161.

CLARENCE A. STEWART, Administrator of the Estate of John R. Stewart, Deceased, *Petitioner*,

v.

SOUTHERN RAILWAY COMPANY, a Corporation, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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OPINIONS BELOW.

The last opinion below, of the United States Circuit Court of Appeals for the Eighth Circuit, is reported in 119 F. (2d) 85 and will be found in the record beginning at page 436.

A previous opinion of the same court, rendered on November 1, 1940, is reported in 115 F. (2d) 317 and will be found in the record beginning at page 402.

STATEMENT.

Petitioner's intestate, John R. Stewart, while employed by respondent as a brakeman in interstate commerce, and at a time when respondent was engaged in interstate commerce, was injured by reason of his right arm being caught and mashed between the draw bars (*i. e.*, between the closed couplers at the ends of the draw bars) as he was between

cars of a cut in a switching yard in East St. Louis, Illinois. (R. 26, 29.) Stewart was an experienced brakeman, sixty years of age at the time of his injury. (R. 54.) The accident occurred on February 12, 1937, at 5:40 P. M. on a dry day. (R. 26-27.)

He sustained a crushing injury to his right forearm, crushed from the elbow to the wrist. (R. 131.) His arm was traumatically amputated, except for two tendons holding it to the elbow. (R. 131.) It was surgically removed the afternoon of the next day. (R. 131.) He died at 8:20 P. M. on the second day, February 14, 1937. (R. 133.) His widow, petitioner's predecessor administratrix, testified that he was a moderate drinker. (R. 57.) His attending physician testified that he developed delirium tremens (R. 132) and that the direct cause of his death was the delirium tremens, with a cardiac dilatation and a certain amount of shock, but that delirium tremens was the principal cause; that Stewart's wife gave the physician a history of Stewart's laying off work and drinking and told him that Stewart had laid off and been on a drunk just prior to the day of his injury. (R. 133.) Mrs. Stewart denied that she had given the physician this history, though she again testified that her husband drank liquor "about like ordinarily a man would drink." (R. 175.)

A doctor of the allopathic school of medicine, witness for plaintiff, (R. 232), who did not see (R. 237) nor treat Stewart (R. 239) and who knew nothing about the case except what he learned from examining the hospital records of the case (R. 202), expressed the opinion that delirium tremens was not a cause of the death (R. 238), although he testified that men do die of delirium tremens where they have been alcoholics and have received an injury. (R. 238.)

Stewart was survived by his dependent widow, Mary Stewart, and by no other dependents or minor children. (R. 3.) The widow was appointed administratrix of his estate by the Probate Court of St. Clair County, Illinois, by letters issued April 16, 1937. (R. 8.)

On April 30, 1937, she filed suit as administratrix against respondent, in the District Court of the United States for the Eastern District of Missouri, under the Federal Employers' Liability Act, seeking recovery for conscious pain and suffering and for the death of her decedent, in the sum of $65,000. (R. 2-4.) The sole charge of negligence was that the couplers between which the deceased was injured were defective, within the meaning of the requirement of the Safety Appliance Act of March 2, 1893, 37 Stat. 531, ch. 196, as amended by the Act of March 2, 1903, 32 Stat. 943, ch. 976. (R. 3.)

Her petition in the cause was signed as attorney by Charles P. Noell, a resident of Missouri, who had been suspended from practice in the courts of Missouri and who was not admitted to practice in the courts of Illinois. Respondent's Illinois lawyers refused to deal with the said Noell regarding settlement of the case because of these facts and because of previous experience they had had with him chasing cases. (R. 273.) It further appears that the said Noell had also been suspended from practice in the federal courts but that the suspension was set aside on appeal. (R. 277.) (See *In re Noell*, 93 F. 2d 5.)

On November 30, 1937, the plaintiff administratrix filed with the Probate Court of St. Clair County, Illinois, a sworn petition representing that respondent, Southern Railway Company, had offered to settle her claim against it for $5,000, provided a full release be given, that it was for the best interests of the estate and all persons interested that such settlement be made, but that one Charles P. Noell, of St. Louis, Missouri, claimed a lien for attorney fees out of any amount she should receive in settlement. She alleged that the claimed lien was null and void and that said Charles P. Noell was not entitled to attorney fees or to any lien therefor on said settlement. Her petition prayed an order authorizing her to make the settlement offered by respondent and giving Charles P. Noell notice to appear and present his claim, if any, for attorney fees or lien. (R. 81-83.)

On the same day, the Probate Court entered an order making findings in accordance with the allegations of the sworn petition of the administratrix, holding that it had jurisdiction of the subject matter and of the parties, and approving the proposed settlement and authorizing the administratrix to make it and to give a full and complete release to respondent. It further ordered that Charles P. Noell be given notice of a hearing on December 10, 1937, on his claim for attorney fees and lien on the $5,000 settlement and ordered the administratrix to make no distribution of the said amount until further order of the court. (R. 96-98.)

The notice was mailed to Charles P. Noell by the Clerk of the Probate Court, in accordance with the order, on the same day, November 30, 1937. (R. 107-108.)

On the same day, under the authorization and approval of the court order, respondent paid the administratrix $5,000, plus $150 to cover the fees of an Illinois attorney who represented her in the Probate Court proceedings, and she executed a full release to respondent. (R. 83-85.)

The record does not tell us what occurred between the administratrix and Charles P. Noell after the latter received the Probate Court's notice of the hearing on his claim against the administratrix, set for December 10, 1937, but the next occurrence is that on December 6th the administratrix went to the offices of respondent's Illinois counsel and tendered back the $5,000 with interest and the tender was rejected. (R. 168-169.)

Then, on December 9th, the day before the hearing set on attorney Noell's claim, the administratrix filed in the said Probate Court a second sworn petition, signed only by her and not by counsel, wholly at variance with her previous sworn petition. In it she alleged that the papers signed by her praying for authority to settle her claim were signed as the result of fraud and duress on the part of respondent and its agents and attorneys; that she had subsequently tendered back the money paid her; that she had pending in the Federal Court in St. Louis, Missouri, a motion to set aside the dismissal of her case and to reinstate it on its

docket. The petition prayed an order setting aside the court's prior order authorizing the settlement. (R. 99.) This petition was sworn to before a Notary Public in Missouri.

This was a direct attack upon the Illinois Probate Court's former order authorizing the settlement.

The Probate Court set the second petition down for hearing. Respondent applied for permission to intervene in support of the order authorizing the settlement and in opposition to the petition to set the same aside. Its motion was granted. After hearing, the Probate Court denied the motion of the administratrix to set aside the order approving and authorizing the settlement. (R. 103.) The administratrix did not appeal from or seek a direct review of this holding of the Probate Court. Instead, she proceeded with her civil action in the Federal District Court in Missouri.

Respondent filed an amended answer in the Federal Court suit, denying the allegations of negligence and for further defense setting up the proceedings in the Probate Court of St. Clair County, Illinois, the settlement and the release in bar. (R. 5-12.)

The administratrix then filed a reply in which she undertook to make a collateral attack on the judgment of the said Probate Court. She alleged that the settlement documents were obtained by respondent by fraud and duress, in the absence of her counsel, repeated her prayer for recovery of money damages and in express terms prayed the Federal District Court in Missouri to hold the judgment of the Probate Court in Illinois null and void and to hold the release given pursuant thereto null and void. (R. 13-17.)

The liability action was tried to judge and jury in the District Court in June, 1939. At the close of the entire evidence respondent moved for a directed verdict on the grounds:

1. That there was no substantial evidence of actionable negligence.

2. That there was no substantial evidence that actionable negligence was the proximate cause of the injuries and death.

3. That there was no substantial evidence of any breach of duty by respondent.

4. That the proceedings in and judgment of the Probate Court in Illinois were binding on plaintiff and could not be collaterally attacked by her in the suit.

5. That there was no substantial evidence of actionable fraud or duress or tending to impeach the validity of the release. (R. 319-321.)

The motion was refused. (R. 321.)

In charging the jury on the issue of damages, the court gave the following ambiguous instruction:

> "You are further instructed that your award to plaintiff, if any, may not exceed the sum of $65,000, the amount claimed by plaintiff, less the sum of $5,000, the amount heretofore received by her." (R. 340.)

The court did not instruct the jury that, if they found a lesser than the maximum amount prayed as the damages to which plaintiff was entitled, they should also return verdict for such amount less the $5,000 plaintiff had already received. The jury returned a general verdict, finding for plaintiff in the amount of $17,500. (R. 20.) No one could tell from the verdict whether the jury intended that plaintiff should recover $17,500 in addition to the $5,000 she had already received, *i. e.*, an unnamed total of $22,500, or whether it intended that the $5,000 be deducted from the amount of $17,500 named in the verdict, that is judgment for $12,500 more than she had already received.

The court put upon the verdict the construction most favorable to plaintiff and entered judgment for recovery of $17,500 in addition to the $5,000 plaintiff had already received, which meant total recovery of $22,500 instead of $17,500. (R. 20-21.) It, however, stayed execution pend-

ing ruling on respondent's motion for judgment *non obstante veredicto* or, in the alternative, for new trial. (R. 21-22.)

Respondent moved for judgment *non obstante veredicto*, and in the alternative for new trial, on the following grounds (in addition to errors assigned to rulings on evidence and to instructions given or refused):

1. That the verdict was not supported by any competent or legal evidence.

2. That the release was binding on plaintiff and there was no evidence showing any fraud or duress.

3. That the judgments of the Probate Court of Illinois were *res judicata* and could not be collaterally attacked in the cause.

7. That the verdict was so indefinite as to be a nullity (by reason of the ambiguity above pointed out).

10. That the court erred in overruling and denying defendant's motion for directed verdict.

11. That there was no substantial evidence proving or tending to prove a violation by defendant of the Safety Appliance Act. (R. 22-24.)

The District Court overruled this motion (R. 24) and respondent appealed to the Circuit Court of Appeals assigning as error all the points made grounds of the above motion. (R. 349-396.)

Pending the appeal, the widow-administratrix died and, upon suggestion of her death, the Court of Appeals, on stipulation of counsel, made an order substituting the present petitioner, Clarence A. Stewart, Administrator, as appellee. (R. 401-402.)

Holdings by the Court of Appeals Below.

In its first opinion, in 115 F. (2d) 317 (R. 402-411), the Court of Appeals held, on the liability issue, with practically no discussion, that the Safety Appliance Act must be liberally construed and that the (undiscussed) evidence

of record was sufficient to warrant the jury in drawing the inference "that there was probable cause to believe that the injury suffered was caused by the breach of duty charged." (R. 409.)

On the issue as to *res judicata* and collateral attack, it held that the widow-administratrix "was not compelled by law to apply to the Probate Court for authority respecting the compromise of this case, and we think the action of the trial court in rejecting the evidence of approval by the Probate Court of the compromise settlement was justified." (R. 410.)

On the issue of fraud and duress in securing the settlement and release, the court below held that the evidence relied on "was not strongly in support of the charge of fraud and duress" but that it was sufficient to go to the jury. (R. 410-411.)

The Court, however, held that an instruction by the trial court was erroneous, as inconsistent with the burden of proof on plaintiff, which authorized the jury to draw an inference of respondent's negligence as to the alleged safety appliance defect from the presumption of due care on the part of the plaintiff's decedent. This was, we think, entirely correctly held on authority of *Looney* v. *Metropolitan Railroad Co.*, 200 U. S. 480, 487, 488, where this Court held that the burden is on the plaintiff to show that appliances are defective; that negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff; that there is an equal presumption that defendant performed its duty, which must be overcome by direct evidence; and that one presumption cannot be built upon another. Accordingly, the Court reversed and remanded for a new trial. (R. 411, 412.)

Both parties petitioned the Court below for rehearing, respondent reasserting on all the same grounds that judgment *non obstante veredicto* should have been entered by the trial court and that the Court of Appeals should have reversed on this ground rather than remanding for new

trial (R. 413-422), while petitioner charged error in holding the instruction erroneous and in remanding for new trial rather than affirming. (R. 423-434.)

The Court below granted both petitions for rehearing and vacated its prior judgment. (R. 435.) In its second opinion, on rehearing, 119 F. (2d) 85 (R. 437, 439), it said:

> "On this reargument the question of the insufficiency of the evidence* is brought sharply to our attention, and in our view of the record, it will only be necessary to consider that question."

Whereas in its previous opinion the Court had only reviewed the evidence bearing on the issue of fraud and duress in the settlement and release, in its last opinion it fully and carefully reviewed and analyzed the evidence bearing on the negligence issue. It completely demonstrated and held that there was no substantial evidence to sustain a finding that the safety appliance was defective and that the verdict, as to the sole charge of negligence, rested wholly upon conjecture and surmise. (R. 439-444.) Accordingly, it reversed the judgment of the trial court and remanded with directions to grant respondent's motion for judgment in its favor notwithstanding the verdict (R. 444) without dealing with the other defenses pressed by respondent: settlement and release; *res judicata* and collateral attack; insufficiency of evidence as to fraud and duress. The sustaining of either of these other defenses would have resulted in the same judgment of reversal and judgment *non obstante veredicto* for respondent. Hence it is open to respondent here to rely on these other defenses, as well as upon the ground upon which the Court below based its judgment, either in opposition to certiorari or on the merits in support of the judgment sought to be reviewed, if the writ should be granted. *United States* v. *American Ry. Ex. Co.*, 265 U. S. 425, 435; *Story Parchment Paper Co.* v. *Paterson*, 282 U. S. 555, 560; *Langnes* v. *Green*, 282 U. S. 531, 535; *Helvering* v. *Gowran*, 302 U. S. 238, 245;

*As to the allegation of negligence in defective coupler.

Ticonic Nat'l Bank v. *Sprague*, 303 U. S. 406, 410, Note 3; *LeTulle* v. *Scofield*, 308 U. S. 415, 421; *McGoldrick* v. *Compagnie Gen. Transatlantique*, 309 U. S. 430, 434.

The Evidence Bearing on the Negligence Issue.

There was no direct evidence in the record of any safety appliance defect. Plaintiff below sought a finding that the automatic coupler was defective, in violation of the Safety Appliance Act, upon a chain of reasoning from circumstantial evidence, indispensable links in which chain were constructed by basing an inference upon a presumption and by not only thus piling inference on presumption but even doing it in the teeth of positive, undisputed evidence negativing the pyramided inference. Petitioner here seeks certiorari, and bases its charge of error in the judgment below, of conflict with other Circuits and of conflict with this Court's decisions, on the same fallacious chain of reasoning.

That chain of reasoning runs thus: the statute requires couplers coupling automatically, without the necessity of men going between cars; if the pinlifter lever on the side of the car and the mechanism connecting it with the coupler knuckle is in proper working condition so as to open the coupler knuckle on a fair trial, then it is not necessary for the man to go between cars to open a knuckle by hand; Stewart went between cars*; it must be presumed that he would not negligently go between cars to open a knuckle by hand** if the pin lifter mechanism upon fair trial would open the knuckle; *ergo* it must be inferred from the preceding presumption, and without any evidence of the fact***, that Stewart did give the pinlifter mechanism a fair trial, that it would not efficiently operate to open the coupler knuckle, that therefore the coupler mechanism was

*There is no evidence as to why he did so.

**The assertion that he went in for that purpose is based on pure surmise.

***Indeed, as pointed out by the court below, there was positive evidence to the contrary.

defective within the meaning of the statute; and that *ergo* it was a defective mechanism which made it necessary for Stewart to go between cars for the (wholly assumed) purpose of opening the knuckle by hand; hence a safety appliance defect was the proximate cause of his injury *and* of his death.

One vice in this chain of reasoning is the very vice which the Court below in its first opinion found in the charge of the trial court, that it bases an inference that the mechanism was defective wholly upon a presumption that the deceased would not do a negligent thing, overlooking the equal presumption that respondent would not negligently have a defective mechanism, and utterly overlooking the burden of proof which rested on the plaintiff.

Another equal vice in the reasoning is that it not only bases the inference, that Stewart made a fair effort to open the knuckle by lifting the pinlifter and that it would not work, solely on the presumption of Stewart's non-negligence, but that it indulges that inference in the teeth of the evidence of the engineer, that he was watching Stewart all the time for signals and that he did not see him try to lift the pinlifter, although the visibility between them was clear. (R. 46, 47.)

Plaintiff below sought, and petitioner here seeks, to bolster the foregoing fallacious chain of reasoning by another equally fallacious chain. The second chain runs thus: the foreman, Stogner, who was about 90 feet away from Stewart and was not watching him and did not observe whether he tried to use the pinlifter (R. 43), heard Stewart "holler" and went and found him with his arm caught between two closed couplers (R. 29); Stogner didn't know of any other duty that Stewart had at the time except to couple the two cars between which he was caught (R. 34-35); after the accident and after the injured Stewart had been released, Stogner coupled the two couplers between which Stewart had previously been caught, opening one coupler knuckle by hand (R. 34); if the pinlifter is working it is not necessary to go between cars to open knuckles by hand

(R. 34); Stogner testified that he tried the pinlifter to one of the couplers* but did not try the pinlifter to the other coupler (R. 36); it must be presumed that Stogner would not have negligently gone between cars and opened the coupler by hand after the accident unless upon a fair trial the pinlifter would not open the knuckle; *ergo* the mechanism was defective after the impact which injured Stewart; *and ergo* it must have been defective before the accident.

The same vice of pyramiding an inference on the presumption of the witness' non-negligence to overcome the equal presumption of defendant's non-negligence, and in spite of the burden of proof being on plaintiff, is obvious in this bolstering chain of reasoning.

But it contains other vices. Stogner was a living witness with knowledge of facts. He did not testify that he gave the pinlifter a fair trial. He did not say what kind of a trial he gave it. He did not say it would not operate. He was the foreman and could have readily ascertained whether either coupler was defective. He did not testify that either was. Even if there was some defect or maladjustment of the couplers or either of them after the accident, after the impact which crushed Stewart's arm, it does not follow that there was a defect before the accident. Nothing in the evidence negatives the possibility that the impact of the two closed couplers which wounded Stewart may have caused a subsequent defective condition, if such condition in fact existed.

Since this Court does not grant certiorari to a Circuit Court of Appeals "to review evidence and discuss specific facts," *United States* v. *Johnson*, 268 U. S. 220, 227, or to review questions depending "essentially upon an appreciation of the evidence," *Houston Oil Co. of Texas* v. *Goodrich*, 245 U. S. 440, 441, or to review "particularistic applications of general rules turning upon the analysis of special states of fact" or upon "loose allegations of conflict,

*He did not say how hard he tried it, or whether he gave it a fair trial. He did not say it would not work.

conflicts depending upon the petitioning counsel's peculiar view of the facts" (see Frankfurter and Hart, "The Business of the Supreme Court at October Term, 1933," 48 Harv. Law Rev. 268-269), we submit that all that this Court will have to do to pass on the present petition will be to consider the "appreciation" which the Court below gave to the evidence of record here on the liability issue.

When this is done, it will at once be seen that the whole effort of the petition is to have this Court substitute its own "appreciation" of evidence for that of the Court below, to have this Court "review evidence and discuss specific facts," and that all the grounds of the petitions, the statements of questions presented and the reasons relied on for granting the writ, are mere "loose allegations of conflict, conflicts depending upon petitioning counsel's peculiar view of the facts."

The Court below said on this issue (R. 439-444):

> "The statute prohibits a common carrier from using or hauling 'any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of cars.' The test of compliance with these requirements is the operating efficiency of the appliances with which the car is equipped. When a violation of the act is alleged as the basis of a cause of action for damages, the question is not simply whether the coupling device as originally installed conformed to the statutory requirements, or whether the carrier has exercised proper care in keeping it in condition to function efficiently, nor whether the equipment is defective in a general sense through the negligence of the carrier. It is generally held that a violation of the statute is shown by proof that cars upon a fair trial failed to couple automatically by impact. Neither of the parties here question these generally applicable tests. Having them in mind, we shall refer to the proof.
>
> "These couplers weigh some forty pounds each. When functioning properly, they will couple automatically by impact when either one or both couplers are open, but they will not couple automatically when both

knuckles are closed. As one faces the end of a car properly equipped with automatic couplers, on the left side is a pinlifting lever. Where both knuckles of the couplers are closed, it is necessary to prepare the car for coupling on impact by opening one of these knuckles. This, in a properly functioning coupler, may be accomplished by the use of this pinlifting lever, which extends to the outer side of the car, without the necessity of going between the ends of the cars.

"Stewart received his injuries on February 12, 1937. He was an experienced switchman sixty years old, and the switching crew of which he was a member was doing certain switching on track number 12. This track extended east and west and was a straight track. The crew had a group of seventeen cars on this track, which were to be coupled together and then transferred to various industrial switch tracks. The engine was headed west, with all of the cars to be coupled east of it. About seven or eight of the cars, those nearest the engine, had been coupled together and were attached to the engine at the time of the accident. Stewart with the other switchman, was working on the north side of this track, and the engineer was on the north side of his engine. The engineer was operating under signals from Stewart. It was about 5:40 o'clock p. m. Just previous to the accident, the deceased gave the engineer a back-up signal and then a stop signal. The cars were coupled. Deceased walked back to the next car, gave the engineer another back-up signal and a stop signal, both of which were obeyed by the engineer. This left an opening between the seventh and eighth car, and there had been no effort to make this coupling by impact prior to the time the car was stopped, leaving an opening between it and the car to which it was to be coupled. After the car had been stopped pursuant to deceased's signal, he stepped into the space between the two cars and a little later the engineer heard him 'holler,' and although the engineer had not moved the cars that had been coupled together after deceased gave the stop signal, there was nevertheless a collision between the two cars, and deceased's arm was crushed between the couplers of the two cars. Obviously, the car east of the opening must have been shunted west by contact with some force from the east, although the

record is silent on this question, and no cause of action is predicated upon that fact.

"The available pin lifter lever was on the north side of the west end of the car east of the opening. That was the only pin lifter available to the deceased on the north side of the cars in the opening between the two. It was the duty of the deceased to use the pin lifter in opening the knuckle on the car so as to prepare it for impact. *C. & O. R. Co.* v. *Charlton*, 4 Cir., 247 F. 34. There is no evidence that he did so. The engineer, who was taking his signals from the deceased, testified that, 'There was no obstruction between me and him when he gave me the stop signal and went between the cars.' The visibility was 'pretty clear,' and deceased signalled with his hand, which the engineer could see. He testified that he did not notice deceased attempt to use the pin lifter before he went in between the cars, although he was looking at deceased for signals all the time. This would seem to be proof of a negative as nearly as such proof could be made. The engineer who was in position to see and whose business it was to observe what movements the deceased made, testified that he did not see him attempt to use the pin lifter. The effective use of the pin lifter requires a visible effort which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds. As said by us in *Chicago, M. St. P. & P. R. R. Co.* v. *Linehan*, 66 F. 2d 373:

" 'If plaintiff failed to operate the coupler in a proper manner, the fact of its not working would be no evidence of defect. Just how much force may be necessary in operating the pin lever in order to bring about an opening of the knuckle cannot be definitely stated. There is no accurate measuring stick. One pull of the lever might be sufficient if enough force were put behind it, and there might be as much force exerted in one pull as in two or three. The question must be, Was there an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner, and was enough force applied to open the knuckle if the coupler was in proper condition? • • • A court cannot say that one pull upon the lever and failure of the same to respond, regardless of the force used or the manner of operation, is sufficient to show a

defective coupler, nor can it say on the other hand that one pull can never be sufficient to show reasonable force.'

"The point we are here making is that had the deceased made the attempt to operate the pin lifter, his efforts, under the circumstances, could not have escaped the observance of the engineer who was a witness for the plaintiff. The burden of proof was, of course, upon the plaintiff. There had been no previous unsuccessful attempt to make this coupling by impact, which might have been some evidence of insufficiency or defect. It is argued that deceased was excused from any effort to prepare the coupler for impact by use of the pin lifter because it is said there was evidence that the pin lifter did not respond. This contention is based upon the testimony of the switchman Stogner. He testified as follows:

"'Q. Now, after this accident, when you coupled the cars, which I presume you did, did you couple the cars after the accident?

"'A. I did.

"'Q. How did you open the knuckle?

"'A. I opened it with my hand.

"'Q. Let me ask you, Mr. Stogner, if the coupler is working automatically, or the pin lifter, is it necessary to go in between the cars to open with your hands then?

"'A. No, sir.'

"He testified that after the accident he found both knuckles of both couplers closed.

"There was no evidence of mechanical defect or insufficiency in the couplers, including the pin lifter. There was no evidence of an unsuccessful attempt to couple them by impact when prepared for coupling. The testimony of the foreman that he opened the knuckle with his hand does not indicate that there was a defect in the coupling device. His testimony that it is not necessary to go in between the cars to open the coupler with one's hands, if the coupler or pin lifter is working automatically, adds nothing to the proof as to the condition of the couplers on these cars. It certainly does not prove that the coupler or pin lifter on this particular car did not operate satisfactorily. On cross-ex-

amination the witness was asked which knuckle he tried to open or which pin lifter he tried to use, and he answered, 'The one on the north side.' But he does not testify that he was unable to open the knuckle by use of the pin lifter, nor what, if any, effort he made so to do. It must be remembered that this incident occurred after the accident and after deceased's arm had been crushed in the coupler. What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture. Did he make 'an earnest and honest endeavor to operate the coupler in an ordinary and reasonable manner,' and did he make application of 'enough force to open the knuckle if the coupler was in proper condition'? It does not even appear whether this 'try' to open the knuckle came after the knuckle was opened or before. A very essential element is left to conjecture and speculation. '* * * where proven facts give equal support to each of two inconsistent inferences; * * * neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other * * *.' *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; *Wheelock* v. *Freiwald*, 8 Cir., 66 F. 2d 694. Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence. *Midland Valley R. Co.* v. *Fulgham*, 8 Cir., 181 F. 91.

"There being no substantial evidence to sustain the verdict, the judgment appealed from is reversed and the cause remanded with directions to grant the defendant's motion for judgment in its favor notwithstanding the verdict."

ARGUMENT.

POINT ONE.

THE "QUESTIONS PRESENTED," AS STATED IN THE PETITION, DO NOT PROPERLY ARISE ON THE RECORD. THEY ARE BASED ON ASSUMPTIONS OF COUNSEL FOR PETITIONER AS TO SPECIAL STATES OF FACT, NOT BORNE OUT BY THE EVIDENCE, AND UPON MISINTERPRETATIONS OF THE HOLDING BY THE COURT BELOW. THE "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT" ARE SUBJECT TO THE SAME VICES.

A reading of the pertinent portion of the last opinion of the Court below, which we have quoted at length above, pp. 13 to 17, will be sufficient to show that the "Questions Presented," and that the "Reasons Relied on for Allowance of the Writ," as stated in the Petition, do not properly arise upon the record and upon the holding of the Court below, but are shot through with counsel's assumptions of states of fact contrary to the evidence and embody "loose allegations of conflict, conflicts depending upon petitioning counsel's peculiar view of the facts."

The very basis of the petition is contained in the first "Question Presented," as stated on pages 8 and 9 of the petition. The statement of that question contains three basic assumptions wholly contrary to the record. They are:

1. That the deceased was injured "while between two freight cars trying to open the knuckle of the coupler of one of them by hand in order to prepare the coupler for coupling by impact."

2. That the Court below held, under the above (unwarranted) assumption of fact that "the plaintiff, in order to make a case for the jury, must adduce the testimony of an eyewitness to the casualty, affirmatively showing that the deceased employee tried to open the knuckle by operating the lever of the pin lifter at the side of the car before going between the cars to open the same by hand,"

3. And that the Court below made that (assumed) holding "though evidence be adduced to support a finding that the pin lifter was not in efficient working order."

The first above assumption of fact is not borne out by any evidence whatsoever. There was no evidence as to why Stewart went between the cars. There was no evidence that he went there for the purpose of trying to open the knuckle of the coupler by hand. The assumption that he did so is a pure assumption of counsel, based "wholly upon conjecture or surmise," as the court below indicated. (R. 444.)

The second above assumption (as to law or legal inference) is not supported by the record or by the holding of the Court below and is a purely gratuitous reading into the opinion below of something neither said nor held, as well as being wholly based upon the unwarranted factual assumption just above outlined.

The Court below did not hold that the plaintiff, in order to make a case for the jury, must adduce *the testimony of an eyewitness* that the deceased tried to open the knuckle by operating the pin lifter before going between cars to open the knuckle by hand. The court said nothing about the necessity of any *eyewitness*. It was dealing with a case in which there was a total absence of direct evidence of any defect in the coupler mechanism and a total absence of evidence that the mechanism had failed to work on any previous trial. The gist of the holding below was, as shown by the Court's opinion, that where there is no direct evidence of mechanical defect and no evidence that the mechanism failed to operate properly on any trial prior to the injury, and where plaintiff, in support of the allegation of safety appliance defect, relies entirely on the theory that the appliance failed to operate upon a fair trial by the injured employee, then the burden is on plaintiff to prove by sufficient evidence (it did not say by an eyewitness) that the employee gave the mechanism a fair trial and that,

upon such fair trial, the mechanism did not work properly. The correctness of this holding seems so obvious as not to need argument.

Here there was an entire lack of any evidence (whether by eyewitness, circumstantial or otherwise) either (1) that Stewart gave the pin lifter mechanism a fair trial before he went between the cars, or (2) that upon such fair trial the mechanism failed to work. *Indeed, the proof of record is that Stewart did not give the mechanism a trial at all.* The engineer was watching Stewart all the time for signals; he repeatedly saw his hand signals; the visibility was good and he was bound to have seen the effort of Stewart to open the forty-pound knuckle by use of the pin lifter, if he made such effort; yet the engineer did not see him make any such effort. As the Court below cogently observed:

> "This would seem to be proof of a negative as nearly as such proof could be made. The engineer who was in a position to see and whose business it was to observe what movements the deceased made, testified that he did not see him attempt to use the pin lifter. The effective use of the pin lifter requires a visible effort which could scarcely have gone unnoticed had it been made. The knuckle to be opened weighs some forty pounds." (R. 441.)

On this central issue the plaintiff sought to fill in the entire absence of any evidence that Stewart gave the mechanism a fair trial and that upon such fair trial it would not work, and to get away from the direct evidence of the engineer that Stewart did not give the mechanism any sort of trial, by relying entirely on a presumption that Stewart would not have negligently gone between cars without giving the mechanism a fair trial and without ascertaining that it would not work upon such a fair trial.

Thus plaintiff's whole case was grounded upon the vice of basing an inference on a presumption of the deceased's non-negligence, overlooking the fact that an equal and countervailing presumption of non-negligence attends the defendant, and overlooking entirely the burden of proof

resting on plaintiff, thus wholly violating the rule of *Looney v. Metropolitan Railroad Co.*, 200 U. S. 480, 487-488, as the Court below expressly held in its first opinion. (R. 411.)

Moreover, plaintiff rested the case wholly on such an inference, pyramided on a presumption, in the teeth of the direct evidence of the engineer proving that Stewart did not give the mechanism any trial at all.

The third vice in the statement of the first "Question Presented," as stated in the petition, is that it ends with an assumption that the holding wrongly attributed to the Court below was made "though evidence be adduced to support a finding that the pin lifter was not in efficient working order."

There was no evidence to support a finding that the pin lifter was not in efficient working order at the time of the accident. The evidence to which petitioner refers is that of Stogner, the foreman, which dealt exclusively with what happened after the casualty had occurred. The court below dealt with this evidence so fully and with such obvious soundness (R. 442-443) that argument seems unnecessary to add to what was there said.

Stogner testified that after the accident he made the coupling, that he opened a knuckle by hand, that it is not *necessary* to go between cars to open the knuckle by hand if the coupler is working automatically, and that he "tried" one pin lifter. He did not say what kind of a trial he gave it. As the court below said (R. 443), "What effort he made to open the knuckle by use of the pin lifter, or what force he applied, finds no answer in this record but is left to conjecture." He did not say it would not work automatically. He did not say it would not open the knuckle. He did not even say that the pin lifter which he "tried" was the one connected to the particular knuckle which he testified he opened by hand. He did not say that the mechanism was defective or out of adjustment in any way. He did not say it was *necessary* for him to go between cars and to open the knuckle by hand because the pin lifter, when he tried it, would not operate it.

Moreover, Stogner's testimony related entirely to time subsequent to the collision of the two closed coupler knuckles which crushed Stewart's arm. Even if the mechanism was defective or out of adjustment when Stogner gave his "try" to one pin lifter (and there is no evidence that it was) there is nothing in his testimony inconsistent with a theory that the impact which injured Stewart may also have injured the couplers or thrown the mechanism out of adjustment. Another entirely plausible theory, entirely consistent with absence of any safety appliance defect even after the accident and when Stogner gave his "try" to one pin lifter, is that when the two closed couplers came together and crushed Stewart's arm they may have remained so close together that no amount of effort on a pin lifter would open a knuckle, however perfect the mechanism might be, because the closed coupler of the other car was too close to allow room for the knuckle to open without separating the two cars. Obviously no man could open a coupler knuckle by lifting the pin lifter, not only against the forty-pound inertia of the knuckle itself but also against the weight of another freight car standing with its closed coupler too close to the first coupler to leave room for the opening of the knuckle.

Furthermore, as the Court below observed, it did not even appear whether Stogner's "try" of one pin lifter came after the knuckle was opened or before. "A very essential element is left to conjecture and speculation," said the Court. (R. 443.)

It follows that Stogner's entire testimony was no evidence "to support a finding that the pin lifter was not in efficient working order" as assumed in Question One, certainly at the time of the preceding accident. Not the least of the defects in petitioner's reasoning is that it goes, as to Stogner's testimony, wholly on the fallacy of arguing an assumed past condition from an equally assumed subsequent condition.

Obviously the effort to bolster the evidence of Stogner by drawing an inference that he found a safety appliance

defect from a presumption that he would not negligently have gone between cars to open a knuckle by hand unless he gave the pin lifter a *fair* trial and found it would not work, is just as vain as is the effort to draw a like inference from a presumption of the non-negligence of the deceased Stewart.

The Court below completely summarized the case when it said, at the end of its second opinion below (R. 443):

> "Here, there was proof that the deceased did not use or attempt to use the pin lifter. There was no proof that this coupler upon any prior attempt had failed to couple by impact. There was no proof of mechanical defect or insufficiency but only the statement of a witness who says that after the accident he tried to use the pin lifter without stating whether the trial was successful or what effort was included therein. A verdict can not be permitted to stand which rests wholly upon conjecture or surmise, but must be sustained by substantial evidence."

The statement of the Second "Question Presented" (Petition, 9) is subject to the same vices as the first. In it counsel seek to question whether "it will be presumed, *in the absence of evidence to the contrary,* that deceased employee did not subject himself to the risk of injury by going between the cars to open the knuckle by hand without first having tried to use the pin lifter for that purpose." This again assumes, without any evidence to that effect, that Stewart went between the cars for the purpose of opening the knuckle by hand. And it assumes that there was no evidence that he went between cars without first having tried to use the pin lifter for that purpose, when the only pertinent evidence in the record, as pointed out by the court below, that of the engineer, proved that he did go between cars (for some undisclosed purpose) without making any effort to use the pin lifter to open the knuckle.

The question further contains the same vice of seeking to base an inference of defendant's negligence wholly on a presumption that plaintiff's intestate would not have done

a negligent thing, overlooking the equivalent presumption of defendant's non-negligence. It wholly overlooks also the burden of proof.

The Third "Question Presented" (Petition, 9-10) is simply a restatement in another form of the same propositions contained in Questions One and Two, contains the same unwarranted assumptions and the same defects of reasoning.

The Fourth "Question Presented" (Petition, 10) is merely a generalized summary of the propositions contained in the other three questions, with the same unwarranted assumptions implicit and depending upon the same defects of logic.

It is obvious that the "Questions Presented" as stated in the petition do not properly arise upon the record or upon the holding by the Court below.

The "Reasons Relied on for Allowance of the Writ" (Petition, 10-13) are merely restatements in more detail of the same propositions contained in the "Questions Presented," with the same erroneous assumptions as to the state of the evidence and with the same misconceptions as to what the Court below actually held, coupled with "loose allegations of conflict" with unnamed decisions of this Court and of other Circuit Courts of Appeals, "conflicts depending upon the petitioning counsel's peculiar view of the facts."

The reasons, so stated, present no substantial question of conflict of authority and no reason for the exercise by this court of its supervisory jurisdiction by certiorari. Even conflicts between circuits is a basis for certiorari only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393.

The present case, as this Court said of the case just cited (261 U. S. at 393), "certainly comes under neither head." It presents no question of law of importance to the public

as distinguished from the litigant. It presents no real and embarrassing conflict of authority. The case is factual and turns on appreciation of particular evidence.

The petition, by making assumptions of fact contrary to the record, and by putting the petitioning counsel's own peculiar interpretation on the evidence, rather than dealing with the interpretation put upon it by the Court below, seeks only to have this Court substitute its appreciation of particular states of fact and of evidence for that of the Court below, in order that petitioner may have a new trial and a new chance to recover damages for non-dependent collaterals (the only dependent, the widow, being dead) and fees for counsel, in a case which the widow-administratrix herself settled in her lifetime for a very substantial sum, under express authority and approval of the Probate Court of her State whose appointment as administratrix she held.

POINT TWO.

THE DECISION BELOW WAS RIGHT AND IN ACCORD WITH DECISIONS HERE AND IN THE OTHER CIRCUITS. NO CONFLICT OF AUTHORITY IS INVOLVED.

A reading of the opinion below, particularly of that portion of it hereinbefore quoted in the Statement and which covered the issue as to liability, will be, we think, entirely convincing as to the correctness of its holding.

The evidence, that indeed of plaintiff, affirmatively shows, as the court below held, that petitioner's intestate did not use or attempt to use the pin lifter before going between the cars. The holding of non-liability, therefore, is strictly in accord with *Chesapeake & O. Ry. Co.* v. *Charlton* (C. C. A. 4th), 247 Fed. 34, certiorari denied 249 U. S. 614; *Charlton* v. *Chesapeake & O. Ry. Co.* (C. C. A. 4th), 256 Fed. 988; see also *Pennsylvania R. Co.* v. *Jones* (C. C. A. 6th), 300 Fed. 525.

Plaintiff's whole case rested upon an evanescent presumption that Stewart would not negligently have gone be-

tween cars without first making a fair trial to open the coupler by lifting the pin lifter. Even if such a presumption could be indulged, which we deny in view of the equivalent presumption of non-negligence of the defendant and in view of the burden of proof on plaintiff, still such presumption vanished upon the advent of plaintiff's own evidence that the engineer was watching Stewart all the time for signals and acted upon his signals more than once, that the visibility was clear, that he saw Stewart's hand and saw his hand signals, and that he did not notice Stewart make any effort to use the pin lifter before he went in between cars. The decision below is thus strictly in accord with *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; and *Southern Railway Co.* v. *Walters*, 284 U. S. 190.

The decision below is in accord with universal holdings here that unsubstantial evidence, sufficient only to raise a speculation or surmise on an issue of liability, cannot support a verdict. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; *Southern Railway Co.* v. *Walters*, 284 U. S. 190; *Atchison, T. & S. R. Co.* v. *Toops*, 281 U. S. 351.

The decision below is strictly in accord with uniform holdings here that where evidence tends equally to sustain either of two inconsistent inferences or hypotheses, each equally consistent with all the evidence, neither of them can be said to have been established by legitimate proof. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; *Stevens* v. *The White City*, 285 U. S. 195; *New York Central R. Co.* v. *Ambrose*, 280 U. S. 486; *Gulf, etc. R. Co.* v. *Wells*, 275 U. S. 455.

The decision below is in accord with the well settled rule that one presumption or inference cannot be built upon another. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480; *Weekly* v. *Baltimore & O. R. Co.* (C. C. A. 6th), 4 F. (2d) 312, 313.

Upon the entire record, the holding below that there was not sufficient evidence to go to a jury and to support a finding that an inefficient or defective coupler was the proxi-

mate cause of decedent's injury and death is strictly in accord with the holdings in *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, and in *Weekly* v. *Baltimore & O. R. Co.* (C. C. A. 6th), 4 F. (2d) 312.

In his brief (p. 27), petitioner seems to rely heavily on an alleged conflict between the decision below and the decision of the Supreme Court of Mississippi in *Yazoo & M. V. R. Co.* v. *Cockerham*, 134 Miss. 887, 99 So. 14. Such conflict, if it exists, is obviously no ground for certiorari here, and of course it makes no difference in this regard that this Court denied certiorari in the Mississippi case (265 U. S. 586).

A strange misconception is indulged in by petitioner when it is asserted on brief (pp. 27-30) that the ruling below constitutes a plain disregard of the proviso to Section 53 of the Liability Act (45 U. S. C. 53), providing "that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee" and a plain disregard of numerous decisions of this Court to the effect that on an issue of contributory negligence a plaintiff or his decedent will be presumed to have exercised due care for his own safety.

On an issue of contributory negligence the burden is on the defendant pleading that defense. Of course the presumption is indulged that plaintiff or his intestate exercised due care and the defendant has the burden of overcoming that presumption by evidence preponderating to show contributory negligence.

But here there was no issue of contributory negligence. The sole issue was as to defendant's negligence in maintaining a defective coupler and as to proximate cause of injury and death by such negligence. On that issue the burden was on plaintiff, not defendant. Equal and countervailing presumptions of due care attended both Stewart and

the defendant. Obviously plaintiff could not meet the burden of proof by merely relying on a presumption of due care by her intestate. The decisions of this Court cited by petitioner have no application to our situation.

If competent and sufficient evidence by a plaintiff meets the burden of proof and establishes a safety appliance defect as the proximate cause of injury and death, then of course, under the proviso of Section 53 of the Act the employee cannot be held to have been guilty of contributory negligence. But in our case, not on an issue of contributory negligence, but on the basic issue of defendant's negligence, to argue that the holding below that plaintiff failed to meet the burden of proof to establish the alleged safety appliance defect was in error in failing to give effect to a presumption of due care on the part of plaintiff's intestate or violated the proviso of Section 53, is simply to beg the whole question as to the alleged safety appliance defect.

Petitioner assumes, without proof, that there was a safety appliance defect. From that erroneous assumption he argues, from the statute, that the deceased could not be held to be guilty of contributory negligence (which was not in issue). Then, by entire *non-sequiter,* petitioner seeks to base upon the presumption of deceased's non-negligence, bolstered by the statutory rule against contributory negligence where there is a violation of a safety statute, the very basic and essential hypothesis that there was a violation of the safety statute, although not proved.

The statutory rule of the proviso against a holding of contributory negligence does not arise until a safety appliance defect has been proved as the cause of the injury. Obviously the existence of an unproved safety appliance defect cannot be predicated, as petitioner seeks to predicate it, on the statutory proviso.

POINT THREE.

A SUFFICIENT GROUND TO SUPPORT THE JUDGMENT OF REVERSAL BELOW, ALTHOUGH NOT PASSED UPON BY THE COURT IN ITS SECOND OPINION, IS THAT THE SETTLEMENT AND RELEASE BY THE ADMINISTRATRIX UNDER EXPRESS AUTHORITY AND APPROVAL OF THE PROBATE COURT OF ILLINOIS WAS BINDING AS A BAR TO HER CAUSE OF ACTION, AND THAT THE DISTRICT COURT BELOW WAS WITHOUT JURISDICTION TO ENTERTAIN A COLLATERAL ATTACK ON THE JUDGMENT OF THE PROBATE COURT DENYING HER DIRECT ATTACK THERE ON THE SETTLEMENT.

A probate court has power to grant administration and to authorize an administrator to settle a death claim. Its order and judgment authorizing such settlement cannot be collaterally attacked. *American Car & Foundry Co.* v. *Anderson* (C. C. A. 8th), 211 F. 301; *Rowe* v. *Fair*, 157 Miss. 326, 128 So. 87; *Keanum* v. *Southern Ry. Co.*, 151 Miss. 784, 119 So. 301; *Dockery* v. *Central, etc., Co.*, 45 Ariz. 434, 45 Pac. (2d) 656; *Compton's Adm'r* v. *Borderland Coal Co.*, 179 Ky. 695, 201 S. W. 20; *McMann* v. *General Acc. Assur. Corporation*, 276 Mich. 108, 267 N. W. 601.

In *McMann* v. *General Acc. Assur. Corporation, supra*, it was held that an order of a probate court approving a settlement for death of an administrator's intestate was a *judgment* that the proposed settlement was fair and just, which was not subject to inquiry as to its sufficiency except by appeal or direct attack and could not be collaterally attacked for fraud. The court said:

> "Appellant argues that the probate court's action in the premises was purely permissive and that its order does not bar this action. No authority, however, is cited. We do not view the probate order of approval in this manner; it was, in effect, a judgment that the proposed settlement was fair and just, and, except by

appeal therefrom or by direct attack in equity for fraud, no other inquiry may be made into its sufficiency." (601-602, citing many cases.)

This principle holds *a fortiori* in our case because here the administratrix not only procured the order of the Probate Court authorizing and approving her settlement, but, after she had suffered a change of heart and sought to repudiate the settlement, she filed a *direct attack* on it in the same Probate Court, which, after hearing, was denied. She did not appeal from that judgment on that direct attack. She could not be heard to attack it collaterally in her liability action in the federal district court.

Federal courts must give full faith and credit to state court judgments. Article IV, Section 1, United States Constitution; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Central Trust Co.* v. *Seasongood*, 130 U. S. 482.

Under the law of Illinois a judgment may not be collaterally attacked where the court rendering the judgment has jurisdiction of subject matter and parties. *Matthews* v. *Doner*, 242 Ill. 592, 127 N. E. 137; *People* v. *Village*, etc., 367 Ill. 301, 11 N. E. (2d) 415.

In Illinois, probate courts have original jurisdiction of the settlement of estates and all probate matters. Illinois Constitution, Article VI, Section 20; Ill. Rev. Stat., State Bar Ass'n Ed. 1937, p. 52; *Ibid*, Sec. 303, chapter 37, p. 1023; *Helea* v. *Verne*, 343 Ill. 325, 175 N. E. 562. In some matters it has equitable jurisdiction, *In re Schmitt's Estate*, 288 Ill. App. 250, 6 N. E. (2d) 444.

The jurisdiction of state probate courts, under the Federal Employers' Liability Act, has been recognized by this court. *Central, etc. Ry. Co.* v. *White*, 238 U. S. 507.

Federal courts recognize and enforce the orders, judgments and decrees of the probate courts of a state. *Williams* v. *Benedict*, 8 How. 107, 111; *Veach* v. *Rice*, 131 U. S. 293; *Christianson* v. *King County*, 239 U. S. 356, 372-3; *O'Conner* v. *Stanley* (C. C. A. 8th), 54 F. (2d) 20, 24, 26.

Under the law of Illinois, the orders and judgments of a probate court, where it has jurisdiction of the subject matter and the parties, cannot be attacked collaterally. *Balsewicz* v. *Railroad*, 240 Ill. 238, 88 N. E. 734; *Baker* v. *Brown*, 372 Ill. 336, 23 N. E. (2d) 710; *Kattleman Estate* v. *Guthrie's Estate*, 142 Ill. 357, 31 N. E. 589; *Ammons* v. *The People*, 11 Ill. 6; *Gillette* v. *Wiley*, 126 Ill. 310, 19 N. E. 287; *Moffitt* v. *Moffitt*, 69 Ill. 641; *People* v. *Pacific Surety Co.*, 130 Ill. App. 502; *Schottler* v. *McArdle*, 174 Ill. App. 125; *Ford* v. *Ford*, 117 Ill. App. 502; *Gearty* v. *L. Fish Furniture Co.*, 289 Ill. App. 538, 7 N. E. (2d) 493.

Petitioner's petition in the District Court below comprehended both an action for wrongful death and an action for conscious pain and suffering of deceased before his death. The latter was strictly an asset of his estate and the Probate Court had full jurisdiction to render judgment with respect to it. 45 U. S. C. 51, 59; *Great Northern Ry. Co.* v. *Capital Trust Co.*, 242 U. S. 144; *St. Louis, etc., Ry. Co.* v. *Craft*, 237 U. S. 648; *Taylor* v. *Taylor*, 232 U. S. 363; *Michigan Cent. R. Co.* v. *Vreeland*, 227 U. S. 59; *Wilcox* v. *International Harvester Co.*, 278 Ill. 465, 116 N. E. 151.

Clearly the judgments of the Probate Court of Illinois could not be collaterally attacked in the Federal District Court in Missouri below, nor could they be ignored, as they were ignored by that Court. *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 88-90.

For this reason, if for no other, the Court of Appeals below should have reversed the judgment of the District Court and the judgment of reversal, though based wholly on other grounds, was right.

POINT FOUR.

EVEN IF THE COLLATERAL ATTACK ON THE JUDGMENTS OF THE PROBATE COURT OF ILLINOIS COULD BE ENTERTAINED IN THE DISTRICT COURT BELOW, THERE WAS NO SUFFICIENT EVIDENCE OF FRAUD OR DURESS IN THE INDUCEMENT OF THE SETTLEMENT AND RELEASE TO AVOID THE RELEASE AND THE JUDGMENT OF THE DISTRICT COURT SHOULD HAVE BEEN REVERSED ON THAT GROUND.

We deem the present brief in opposition to certiorari hardly the appropriate occasion to deal with the record evidence bearing on the issue of fraud or duress in the inducement of the settlement and release. There was no effort by plaintiff to prove fraud or misrepresentation. The whole issue revolved around a very tenuous theory of duress applied not directly to the plaintiff administratrix but claimed to have been applied to her son-in-law, one Hamm, who, incidentally did not testify in support of the issue, though he was available. (See the discussion of this issue in the first opinion of the court below, R. 403-407, 410.) The Court below did not pass on this issue in its second opinion.

We wish here merely to reserve the right to show, if it should become necessary to meet this case on the merits in this Court, and we should confidently expect in such case to show, that the evidence in support of the allegations of fraud and duress in the inducement of the settlement and release was not only "not strongly in support of the charge," as the Court below declared in its first opinion (R. 410), but was utterly insufficient to support a verdict and judgment setting aside the release or disregarding it as a complete bar to plaintiff's cause of action.

CONCLUSION.

It is submitted that no sound grounds for certiorari are presented in the petition; that no question of conflict of authorities is presented; that the decision below is in harmony with, and not in conflict with, controlling decisions here and apposite decisions of other circuit courts of appeals; that the decision below was right on the ground upon which the Court below based it and on other grounds not passed upon; and that the petition for certiorari should be denied.

Respectfully submitted,

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